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No. 85-999

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,

Petitioner,

v.

PHILLIP PARADISE, JR., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* FOR THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.

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QUESTION PRESENTED

Whether the Fourteenth and Fifth Amendments prohibit the use of a one for one promotion ratio to remedy the discriminatory effects of and prevent future discriminatory actions by a governmental employer.

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PHILLIP PARADISE, JR., et al.,

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On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

BRIEF AMICUS CURIAE FOR THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.

INTEREST OF AMICUS

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit

corporation formed to assist Blacks to secure their constitutional and civil rights by means of litigation. Since 1965 the Fund's attorneys have represented plaintiffs in several hundred employment discrimination actions under Title VII and the Fourteenth Amendment, including many of the employment discrimination cases decided by this Court. In attempting to frame remedies to redress, prevent and deter discrimination, we have repeatedly found, as have the courts hearing those cases, that race conscious numerical remedies are for a variety of pragmatic reasons a practical necessity. In some instances, numerical remedies are essential to ending ongoing intentional discrimination. In other circumstances, such remedies are a practical necessity in

resolving by settlement, disputes as to the identities of direct or indirect victims of discrimination. We believe that effective enforcement of Title VII would at times be impossible unless numerical orders remain among the arsenal of remedial devices available to the federal courts. The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk.

SUMMARY OF ARGUMENT

This case raises important questions regarding the power and resolve of the Federal courts to eliminate the last vestiges of discrimination in our society. In Albemarle Paper Co., v. Moody, 422 U.S. 405, 418 (1975), this Court held that the

critical objective of Title VII is "to eliminate so far as possible, the last vestiges" of discrimination.[1] The Solicitor General, however, would impose a parsimonious interpretation on that mandate, and exclude from its reach one of the harsh results of such discrimination: the virtual exclusion of blacks from all but entry level positions with the Alabama Highway Patrol.

In answering the constitutional

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[1] A number of the cases described herein involve Title VII as well as constitutional claims. In a Title VII case the practical remedial problems are similar to those in a Fourteenth Amendment case. See, Louisiana v. United States, 380 U.S. 145. 154 (1965):

> ...the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.

question addressed by the parties to this action, the Court must necessarily consider the power of the federal court to order comprehensive race conscious relief, particularly where, as here, the defendant has made extraordinary efforts to defeat prior orders from the court. That inquiry is emblazoned by the position of the Alabama Highway Patrol as a veritable icon of racial bigotry and oppression of blacks throughout the south.

Few defendants come to this court with so rich a history of discrimination, or so clear a mantle of discriminatory oppression, as does the Alabama Highway Patrol. The actions of this defendant in excluding blacks from their ranks; evading court orders and consent ecrees requiring the integration of their workforce; and

its participation in some of the most infamous abuses of the rights of black people during the struggle for civil rights, exemplifies the reasons race conscious promotional relief is a necessary and appropriate tool in eliminating the effects of entrenched racial discrimination.

In 1972 Chief District Judge Frank M. Johnson found that the Alabama Department of Public Safety (the parent agency of the Alabama Highway Patrol) "engaged in a blatant and continuous pattern and practice of discrimination" against blacks, and noted that "[I]n the thirty-seven year history of the patrol there has never been a black trooper". NAACP v. Allen, 340 F.Supp. 703, 705 (M.D. Ala. 1972), aff'd, 493 F.2d 614 (5th Cir.

1974). In order to eliminate the effects of that record of discrimination, the court ordered that 50% of the entry level troopers hired by the department be black until 25% of the trooper force was black.

Notwithstanding this clear mandate, the Department continuously tried to frustrate the order. In 1975 the district court found that the defendant, for the purpose of frustrating or delaying full relief to the plaintiff class, artificially restricted the size of the trooper force and the number of troopers hired.[2] In 1979 the district court found that the effects of the defendant's discrimination pervaded all levels of the Department, and noted that the hiring

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[2] See Order of August 5, 1975, Joint Appendix 34.

relief ordered in 1972 was designed to provide an impetus to promote blacks into positions above the rank of entry-level trooper. Paradise v. Prescott, 767 F.2d 1514 (1985), quoting Paradise v. Shoemaker, 470 F.Supp. 439, 442 (M.D. Ala. 1979).

By December 1983, nearly 12 years after the 1972 order, only 4 of 197 persons above entry level were black, and none of them were above the rank of corporal. Paradise v. Prescott, 585 F.Supp. 72, 74 (M.D. Ala. 1983), aff'd, 767 F.2d 1514 (11th Cir. 1985), cert. granted, 106 S.Ct. 3331 (1986).

This specific record of intentional and continuous frustration of the employment opportunities of blacks is best evaluated when overlaid with the societal

discrimination prevalent in Alabama, and the role played by the Alabama Highway Patrol as the protector of the status quo. The efforts of the Department to exclude blacks from its ranks and then to prevent their advancement within those ranks is in keeping with the role of the department as a bastion of the Jim Crow era. Particularly vivid in the minds of blacks through out this nation are images of Alabama State Troopers driving black civil rights demonstrators from the Courthouse lawn in Gadsden, Alabama using cattle prods and nightsticks.[3]

This Court cannot afford to ignore this history, and the special position of public safety agencies, in determining

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[3] United States Commission on Civil Rights, Law Enforcement: A Report on Equal Protection in the South (1965) p. 63.

whether the one for one promotion ratio is permissible under the Equal Protection clause. While this Court remains divided on the question of whether strict scrutiny or an intermediate standard applies when evaluating an affirmative action plan, on the facts of this case the government plainly has both an important and compelling interest in rectifying this situation. These concerns are no less important in determining the scope of the remedy which, though narrowly defined, must be designed to completely eradicate the effects of this history of discrimination.

Both Courts below conscientiously applied these standards and held that, in the light of the history of this case, the district court's enforcement of the

consent decree was "eminently reasonable" and moreover that "without promotional quotas the continuing effects of this [long-term, open and pervasive racial] discrimination cannot be eliminated". Paradise v. Prescott, 767 F.2d 1514, 1533 (1985).

The 1983 order imposing one for one promotion is reasonably designed to insure that the last vestiges of the long and brutal history of discrimination by the Department are eradicated. Moreover, in fashioning a remedy that is both flexible and temporary, the court below avoided imposing unnecessary burdens on the white troopers, while insuring that blacks would no longer be unfairly denied opportunities which had been withheld for almost half a century. Plainly the court below

considered the availability and efficacy of other remedies, Fullilove v. Klutznick, 448 U.S. 448 (1980). However such avenues of redress were ineffective because the Department actively sought to frustrate compliance with the court's order. Notwithstanding that history the court did not permanently impose a one for one promotion ratio; rather, once a nondiscriminatory promotion system was developed, the one for one ratio ceased to apply.

The efforts undertaken by the experienced Federal judges who considered this case are necessary tools in the elimination of the lingering effects of the history, and, as here, current discrimination suffered by blacks in this country. If the methods used here, under

circumstances as egregious and significant as here portrayed are ruled unconstitutional, than there will be little means available to seriously address the mandate of Albemarle, and Louisiana v. U.S., 380 U.S. 145, 154 (1965).

ARGUMENT

I. REMEDYING RACIAL DISCRIMINATION BY A STATE ACTOR IS A SUFFICIENT STATE INTEREST TO WARRANT REMEDIAL USE OF RACE CONSCIOUS REMEDIES.

While the members of this Court "have not yet agreed ... on the proper test to be applied in analyzing the constitutionality of race-conscious remedial measures", Local 28, Sheet Metal Workers' International Association v.

EEOC, 106 S.Ct. 3019, 3052 (1986) (Opinion of Brennan, J.),[4] two principles are certain. One, that "..whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program", Wygant v. Jackson Board of Education, 106 S. Ct. 1842, 1853 (Opinion of O'Connor, J., slip p.3); and, two, that race-conscious remedies designed to eliminate the vestiges of discrimination can be used consistent with the Equal

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[4] See, Regents of the University of California v. Bakke, 438 U.S. 265, (four justices favoring strict scrutiny and four favoring intermediate scrutiny); Fullilove v. Klutznick, 448 U.S. 448 (1980) (three justices favoring strict scrutiny three favoring intermediate scrutiny and three declining to decide the issue.

Protection guarantees of the Fifth and Fourteenth Amendments. Wygant v. Jackson Board of Education, 106 S. Ct. 1842, 1848 (1986) (Opinion of Powell, J., joined by Burger, C.J., and Rehnquist and O'Connor, J.J.); id. at 1853 (Opinion of O'Connor, J.); id. at 1861 (Opinion of Marshall, J., joined by Brennan and Blackmun, J.J.); id. 1867-1868 (Opinion of Stevens, J.); Regents of the University of California v. Bakke, 438 U.S. 265, 320 (1978) (Opinion of Powell , J.); id. at 325 (Opinion of Brennan, J., joined by White, Marshall and Blackmum, J.J); Local 28, Sheet Metal Workers' International Association v. EEOC, 106 S.Ct. 3019, 3052 (1986) (Opinion of Brennan, J., joined by Marshall, Blackmun and Stevens, J.J.); id. at 3054-55 (Opinion of Powell, J.).

This Court has likewise made plain that race-conscious affirmative relief need not be limited to victims of prior discrimination, Wygant v. Jackson Board of Education, 106 S. Ct. at 1853 (Opinion of O'Connor, J.); id. at 1863 (Opinion of Marshall, J.); id. at 1867-68 (Opinion of Stevens, J.); cf. id. at 1850 (Opinion of Powell, J.); see also Local 28, Sheet Metal Workers' International Association v. EEOC, 106 S.Ct. at 3052-53 (Opinion of Brennan, J.); id. at 3054-57 (Opinion of Powell, J.); and that "innocent persons may be called upon to bear some of the burden of the remedy" Wygant v. Jackson Board of Education, 106 S. Ct. at 1850 (Opinion of Powell, J.).

II. THE ROLE OF THE ALABAMA HIGHWAY PATROL IN THE OPPRESSION OF BLACK PEOPLE IS IMPORTANT IN DETERMINING THE SCOPE OF THE REMEDY WHICH, THOUGH NARROWLY TAILORED, ACCOMPLISHES ITS PURPOSE

There can be no doubt, as the Solicitor General concedes, that government has a "compelling interest" in remedying racial discrimination practiced by a public employer. (Brief For The United States at 21). Equally important however, is the fashioning of a remedy to eradicate the effects of that discrimination. In determining the scope of that remedy it is important to assess the scope of the effects of the discrimination that is to be remedied. Here, the history of the Alabama Highway

Patrol, as an instrument of oppression of black people, is critical to that assessment.

The current effects of that history and the fact that their are still no blacks above the rank of corporal, demonstrates that the effects of that awful history continue to linger. The effects linger in the form of an all-white supervisory force; they linger in the form of intransigence by that supervisory force to the promotion of qualified blacks; and they linger in the form of social and official discrimination which led to an unusually high attrition rate for blacks who were hired.[5]

The refusal of the department to

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[5] Order of August 5, 1975, Joint Appendix 34.

incorporate blacks into any but the lowest level of the department, reenforce attitudes formed by the pernicious behavior of the Alabama Highway Patrol during the struggle for Civil Rights in the South.

In Williams v. Wallace, 240 F.Supp. 100 (M.D. Ala. 1965), the District Court, Johnson, J., issued an injunction enjoining the Governor of the State of Alabama, George C. Wallace, the Director of Public Safety for the State of Alabama, Albert J. Lingo, and others, "from intimidating, threatening, coercing or interfering with the proposed march" from Selma, Alabama, to Montgomery, Alabama, in March of 1965. 240 F.Supp. at 109.

The court's order was precipitated by the continuous brutal conduct of the all-

white Alabama State Troopers, and their constant efforts to harass, intimidate, coerce, threaten and brutalize blacks engaged in demonstrations for the purpose of encouraging blacks in their attempt to register to vote, and to protest discriminatory voter registration practices in Alabama.

For example, the district court made the following findings with respect to the State Troopers' efforts to disrupt the voter registration demonstrations in Perry County, Alabama:

> [O]n February 18, 1965, when approximately 300 Negroes were engaged in a peaceful demonstration by marching from a Negro church to the Perry County Courthouse for the purpose of publicly protesting racially discriminatory voter registration practices in Perry County, Alabama, the Negro demonstrators were stopped by the State troopers under the command of

> the defendant Lingo, and the Negro demonstrators were at that time pushed, prodded, struck, beaten and knocked down. This action resulted in the injury of several Negroes, one of whom was shot by an Alabama State Trooper and subsequently died.

Williams v. Wallace, 240 F.Supp. at 104.

These efforts of the Alabama State Troopers and others came to a dramatic climax on Sunday, March 7, 1965. Approximately 650 black demonstrators left the church in Selma, Alabama, for the purpose of walking to Montgomery, Alabama. There the demonstrators planned to present to the Governor their grievances concerning the discriminatory voter registration practices in several central Alabama counties, and, the restrictions that had been imposed on their public demonstration in opposition to these practices.

As the demonstrators proceeded to the Edmund Pettus bridge near the south edge of the City of Selma, they were "confronted by a detachment of 60 to 70 State troopers headed by the defendant Colonel Lingo". Id. at 105. As detailed by the District Court, the troopers then proceed to implement their plan to disperse the demonstrators, using tactics "similar to those recommended for use by the United States Army to quell armed rioters in occupied countries." Id. at 105.

> The troopers, equipped with tear gas, nausea gas and canisters of smoke, as well as billy clubs, advanced on the Negroes. Approximately 20 canisters of tear gas, nausea gas, and canisters of smoke were rolled into the Negroes by these State officers. The Negroes were then prodded, struck, beaten and knocked down by members of the Alabama State Troopers. The

> mounted "possemen," supposedly acting as an auxiliary law enforcement unit of the Dallas County sheriff's office, then, on their horses, moved in and chased and beat the fleeing Negroes. Approximately 75 to 80 of the Negroes were injured, with a large number being hospitalized.

Williams v. Wallace, 240 F.Supp. at 105.

These events not only obliged the court to grant the injunction restraining the brutal activities of the Alabama State Troopers, but also played a significant role in the subsequent passage of the Voting Rights Act of 1965.

The activities of the Alabama Highway Patrol were not however limited to disrupting the efforts of blacks to obtain access to the ballot box. Indeed Alabama State Troopers have been commonly used to enforce the racial status quo. In 1965 the United States Commission on Civil

Rights documented several incidents in which local government agencies used violence and suppression to preserve the subservient position of blacks, by suppressing the attempts of local blacks to assert their constitutional rights. In each of the events cited by the Commission, local law enforcement agencies either refused to protect black demonstrators from violence, see, United States v. U.S. Klans, 194 F. Supp. 897 (M.D. Ala. 1961), or were in fact the perpetrators of violence against the demonstrators.

The report makes specific mention of the Alabama State Troopers during a demonstration in Gadsden, Alabama, on June 1, 1963.

> A few days after the first sit-in, city officials obtained

> a State Court injunction that prohibited demonstrators from blocking sidewalks, entrances to stores, and traffic, but expressly permitted certain types of peaceful demonstrations. The next afternoon . . . 235 persons were arrested for violating the injunction. That evening a large group of Negroes assembled on the courthouse lawn to protest the arrests; they were driven from the lawn by Alabama State troopers using cattle prods and nightsticks.

U.S. Commission on Civil Rights, Law Enforcement: A Report on Equal Protection in the South (1965), p.63.

Such actions by the Alabama Highway Patrol put them in the forefront of the brutal struggle to maintain the rigid pattern of racial segregation that existed in Alabama. Indeed when Governor George C. Wallace made his infamous "stand in the schoolhouse door" in defiance of a Federal Court Order to desegregate the University

of Alabama, he was "flanked by state troopers".[6] The backbone of this rigid policy of segregation was a series of laws requiring segregation, which the apparatus of the state was fully prepared to enforce.[7]

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[6] See New York Times, Wednesday, June 12, 1963, page 1.

[7] See, e.g., United States of America v. The State of Alabama, Civil Action Number 83-C-1676-S, p.2. (Northern District of Alabama, Southern Division, December 7, 1985), wherein the court makes exhaustive findings regarding segregation in higher education in Alabama, and concludes that:

> ... the State of Alabama has indeed operated a dual system of higher education; that in certain respects, the dual system yet exists; and that in other respects, the "root and branches" of the dual system have not been eliminated.

Gunnar Myrdal, in his classic work An American Dilemma, uses Alabama as an example of the particularly egregious operation, administration and enforcement of discriminatory practices or laws. Noting that of all the black policemen, detectives, marshals, sheriffs,

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As one district court observed, the "march of history" in Alabama was an "extensive and extended history of exclusion of blacks from the Alabama political and governmental system," which included discriminatory exclusion from jury service and from voting employment and educational opportunities. Whitehead v. Oliver, 339 F. Supp. 348, 355-57 (M.D. Ala. 1975) (Three-Judge Court).

See also, Gunnar Myrdal, American Dilemma, 543, 635-36, 638-39, 952-53 (Pantheon Paperback 1964); N. Bartley, The Rise of Massive Resistance 87-88, 200-201 (Louisiana State University Press 1969); Hawley, "Negro Employment in the Birmingham Metropolitan Area", in Selected Studies of Negro Employment in the South 265 (National Planning Association ed. 1951); Birmingham Area Chamber of Commerce, Century Plus 23 (1976); "Law Enforcement", Birmingham 19-20 (Nov. 1969).

constables, probation and truant officers in 1930, only 7% were employed in the South, Myrdal observes:

> The geographic distribution of Negro policemen is in inverse relation to the percentage of Negroes in the total population. Mississippi, South Carolina, Louisiana, Georgia and Alabama--the only states with more than 1/3 Negro population --have not one Negro policeman in them, though they have nearly 2/5 of the total Negro populations of the nation.

2 G. Myrdal, An American Dilemma 635-36 (Pantheon Paperback 1964).

The discriminatory employment practices of the Alabama Highway Patrol, combined with its specific history of brutality, served to reinforce a reputation in the black community which fostered mistrust and apprehension. In circumstances such as these the courts have often found that mandatory injunctive

relief is necessary to restore faith in these institutions. In Morrow v. Crisler, 491 F.2d 1053, 1055 (5th Cir. 1974) (en banc), cert. denied, 419 U.S. 895 (1974), following intransigence on the part of the Mississippi Highway Patrol similar to that encountered by the court here, the Fifth Circuit noted that some form of mandatory injunctive relief would be essential if the Patrol was to obtain the confidence of the black community:

> The reputation of the Patrol in the black community as a discriminatory employer has posed a formidable obstacle to the achievement of a Patrol which has eradicated all of the effects of past discriminatory practices. . . . Since we are not sanguine enough to be of the view that benign recruitment programs can purge in two years a reputation which discriminatory practices of approximately 30 years have entrenched in the minds of blacks in Mississippi . . .

> additional . . . measures [must] be taken. . . .

The experience of this Court and the lower courts has repeatedly demonstrated that as a practical matter there are secondary and indirect effects of racial discrimination which may often cause severe and enduring injuries. Rogers v. Paul, 382 U.S. 98, 200 (1965) (effect on students of faculty segregation); Gladestone Realtors v. Bellwood, 441 U.S. 91 (1979) (effect on whites of housing discrimination against blacks). That the lower courts were aware of these effects is indicated by the following language from the Fifth Circuit's opinion in NAACP v. Allen, 493 F.2d at 621, which, while it is directed at a hiring ratio, is no less applicable to the promotion ratio currently under consideration.

> The use of quota relief in employment discrimination cases is bottomed on the chancellor's duty to eradicate the continuing effects of past unlawful practices. By mandating the hiring of those who have been the object of discrimination, quota relief promptly operates to change the outward and visible signs of yesterday's racial distinctions and thus, to provide an impetus to the process of dismantling the barriers, psychological or otherwise, erected by past practices.

The Department's discriminatory policies permeated the entire agency, affecting both its employment policy and its treatment of black citizens. The profound impact of the Department's policies and history is not likely to be remedied by the simple inclusion of a few blacks at the lowest levels of employment with the agency. Indeed, failing to address the problem of promotion would be similar to

integrating a school system by having black students but no black teachers; or black teachers but no black principals. See e.g., Rogers v. Paul, 382 U.S. at 200.

The one for one promotion ratio ordered in 1972 was designed to provide an impetus to promote blacks into positions above the rank of entry level trooper Paradise v. Shoemaker, 470 F. Supp. 439, 442 (M.D. Ala. 1979). In order to obtain real change and to give the community a sense of that change, the district court recognized the necessity of insuring that blacks became part of the entire structure of the department. Such action is necessary to prevent discrimination against subordinate minority employees and the public.

III. THE REMEDY FASHIONED BY THE DISTRICT COURT TOOK APPROPRIATE CONSIDERATION OF CRITICALLY IMPORTANT PUBLIC SAFETY CONCERNS

The special function of government and the responsibility of those empowered to enforce the law makes particularly compelling this Court's suggestion that promoting racial diversity in the workforce is a sufficiently compelling government interest to support implementation of an affirmative action plan. See Wygant v. Jackson Board of Education, 106 S.Ct. at 1863 (Opinion of Marshall, J., joined by Brennan and Blackmun, J.J.); id. at 1868 (Opinion of Stevens, J.). See also id. at 106 S.Ct. at 1853 (Opinion of O'Connor, J.).

Moreover it is precisely the evil of racial exclusion and other discriminatory

practices on the part of governmental employers that Congress sought to address when it made Title VII applicable to state and local governmental employers. Similarly in support of her contention that "the remediation of governmental discrimination is of unique importance",[8] Justice O'Connor specifically cited the legislative history of the 1972 Amendment to Title VII.

> Th[e] failure of State and local governmental agencies to accord equal employment opportunities is particularly distressing in light of the importance that these agencies play in the daily lives of the average citizen. From local law enforcement to social services, each citizen is in constant contact with many local agencies. The importance of equal opportunity in these agencies is, therefore, self-evident. . . . Discrimination

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[8] Wygant v. Jackson Board of Education, 106 S.Ct. at 1855.

> by government . . . serves a doubly destructive purpose. The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often hostility toward the entire process of government.

S. Rep. No. 92-415 at 10 (92nd Cong., 1st Sess. 1971)[9]

More specifically, both the Congress and the United States Commission on Civil Rights recognized the particular importance of removing racial barriers to employment with police agencies.

> . . . Barriers to equal employment are greater in police and fire departments than in any other area of State and local government.. . . State police forces employ very few Negro

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[9] Reprinted in Legislative History of the Equal Employment Opportunity Act of 1972 (1972) at 419.

> policemen. . . . Police and fire departments have discouraged minority persons from joining their ranks by failure to recruit effectively and by permitting unequal treatment on the job including unequal promotional opportunities, discriminatory job assignments, and harassment by fellow workers.. . . Unless special precautions are taken, a past history of overt discrimination may continue to deter minority applications for employment or advancement, particularly with respect to positions which have not traditionally been held by minority persons.

United States Commission on Civil Rights, For all the People . . . By All the People--A Report on Equal Opportunity in State and Local Government Employment (1969), reprinted as exhibit Legislative History of the Equal Employment Opportunity Act of 1972 (92nd Cong. 1972) p.1118-1119.

Almost twenty years ago the Report of

the National Advisory Commission on Civil Disorders (Bantam Books ed., 1968), pointedly noted circumstances which surely apply to the Alabama Highway Patrol.

> [F]or police in a Negro community to be predominantly white can serve as a dangerous irritant; a feeling may develop that the community is not being policed to maintain civil peace but to maintain the status quo.

Id. at 315.

The United States Civil Rights Commission in its publication, Who is Guarding the Guardians?: A Report on Police Practices (1981), made a similar observation while quoting a report of the National Minority Advisory Council on Criminal Justice, October 1980.[10] The

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[10] The National Minority Advisory Council on Criminal Justice was established in June 1976 by the Law Enforcement Assistance Administration of the U.S. Department of Justice.

Advisory Council's report noted that the nation's first police force was developed in the South to prevent disruptions by slaves, and that typically the police share the society's views of minorities and those views are reflected in the police agencies dealings with minorities.

These and similar observations have led to the conclusion, noted by Justice Stevens, that it might reasonably be concluded that a racially diverse police force "could develop a better relationship with the community and thereby do a more effective job of maintaining law and order than a force composed only of white officers", Wygant v. Jackson Board of Education, 106 S.Ct. at 1868, a view similarly expressed by the First, Second, Fourth, Fifth, Sixth, Seventh and Eighth

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Circuits.[11] These opinions share an awareness of the deleterious effect on the community of maintenance of segregated employment patterns in law enforcement agencies, which is not limited to lower level positions.

> This need extends to the higher ranks in police departments, such as the rank of sergeant involved in this case:
>
> If minority groups are

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[11] See Boston Chapter, NAACP v. Beecher, 679 F.2d 965, 977 (1st Cir. 1982); Bridgeport Guard, Inc. v. Bridgeport Civil Serv. Com., 482 F.2d 1333, 1340-41 (2d Cir. 1973); Talbert v. City of Richmond, 648 F.2d 925, 931-32 (4th Cir. 1981), cert. denied, 454 U.S. 145 (1982); NAACP v. Allen, 493 F.2d 614, 621 (5th Cir. 1974); Detroit Police Officers Ass'n. v. Young, 608 F.2d 671, 695-96 (6th Cir. 1979); United States v. City of Chicago, 663 F. 2d 1354, 1364 (7th Cir. 1981) (en banc); Carter v. Gallagher, 452 F.2d 315, 331 (8th Cir. 1971) (en banc), cert. denied, 406 U.S. 950 (1972). See also President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police 167 (1969).

> to feel that they are not policed entirely by a white police force, they must see that Negro or other minority officers participate in policy-making and other crucial decisions.

Detroit Police Officers' Ass'n. v. Young, 608 F.2d 671, 995 (6th Cir. 1979) (quoting President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Police 167). See also, Talbert v. City of Richmond, 648 F.2d 925, 932 (4th Cir. 1981).

As graphically reported by the Sixth Circuit, the effects of black senior officers can markedly change the tenor and outcome of interactions between the police and minority citizens.

> The record established a pattern of mistreatment in the form of outright discrimination by white officers against black citizens

> as well as more subtle discrimination in the handling of complaints and investigations. A number of witnesses testified to the fact that many such incidents could have been avoided had black lieutenants been overseeing the interaction of police officers and black citizens.[12]

Given the brutal history of the Alabama Highway Patrol and its active role in the suppression of blacks, the view taken by the Sixth Circuit in Bratton v. City of Detroit, 704 F.2d 878, 897 n.44 is particularly pertinent:

> We have chosen to deal with the situation with regard to the Detroit citizenry as an element of our redress analysis. This is so because in Detroit the issue cannot be neatly categorized within the bounds of "operational needs." We are faced with far more than a generalized need for a police force which reflects the racial

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[12] Bratton v. City of Detroit, 704 F.2d 878,895-96 (6th Cir. 1983).

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> composition of the city. We are faced, rather, with a population that has been subjected to constitutional indignities as a direct result of the discriminatory practices which have created and maintained a white-dominated police force. Whatever the appropriate semantics in such a situation, we are convinced that the facts present a constitutionally valid justification (a substantial governmental interest) for the implementation of this particular remedy.

Certainly no less than the police in the City of Detroit, Alabama State troopers subjected black people to a myriad of constitutional indignities. Indeed the symbolic nature of many of those abuses, such as the actions of the Alabama State Troopers during the March from Selma to Montgomery, are indelible symbols of racial intolerance. As the record in this case indicates, those actions were combined with a deliberate

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policy of excluding blacks from their ranks, and once the most heinous of those abuses were no longer in the public eye, the Alabama Highway Patrol continued to obstruct the integration of its ranks.

The brutal practices of the Alabama Highway Patrol and their discriminatory employment history, as documented in the proceedings below, make plain that the state has an important and compelling interest in fully rectifying this situation.

Here, societal discrimination crystallized in an organization that symbolized the oppression of black people. The refusal of state authorities to integrate the organization was an indication of the reluctance of the State to yield this last bastion of white

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supremacy to the demands of simple justice. This stance and the very nature of the State Troopers demanded comprehensive action on the part of the court, lest it neglect its "duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future". Louisiana v. United States, 380 U.S. 145, 154 (1965). Thus the operational need was both practical (an investigative and law enforcement agency needs the support of the people it protects, and must be seen as fair and even handed) and symbolic (ending the history of the Alabama Highway Patrol as an all-white tormentor of the black community). The one for one promotion remedy appropriately reflects

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the need to eradicate the effects of centuries of exclusion of black people from the power or ability to obtain personal security in Alabama.

IV. THE ONE FOR ONE PROMOTION RATIO INTRODUCED BELOW, WAS NARROWLY TAILORED TO ERADICATE THE DISABLING EFFECTS OF THE DEPARTMENT'S PAST DISCRIMINATION, AND TO PREVENT FUTURE DISCRIMINATION

In Regents of the University of California v. Bakke, 438 U.S. at 307, Justice Powell asserted that the states have "a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination." However the formulation of the Solicitor General would define those effects so narrowly as to leave many of the most pernicious results

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of the Alabama Highway Patrol's actions untouched. Similarly by restricting the available remedies to dismantling specific procedures used to discriminate, the government essentially resurrects the arguments rejected by this Court last term.

The state's interest in eradicating the effects of past discrimination encompasses not only the dismantling of the apparatus of discrimination, but also securing measures that will prevent future discrimination. Local 28, Sheet Metal Workers' International Association v. EEOC, 106 S.Ct. at 3049.

In the case of this defendant it is clear that the lower courts were confronted with a situation in which the entire structure of the Department was

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permeated with intentional and persistent discrimination. Beginning with NAACP v. Allen, 340 F.Supp. 703, 705-6 (M.D. Ala. 1972), aff'd, 493 F.2d 614 (5th Cir. 1974), the district court found unequivocally that the Department "engaged in a blatant and continuous pattern and practice of discrimination in hiring", and that:

> The racial discrimination in this instance has so permeated the Department of Public Safety's employment policies that both mandatory and prohibitory injunctive relief are necessary to end these discriminatory practices and to make some substantial progress toward eliminating their effects.

In 1975 the Court of Appeals observed:

> As in Morrow, [v. Crisler, 491 F.2d 1053 (5th Cir. 1974)], the district court was confronted with (1) clear evidence of a

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> long history of intentional racial discrimination, (2) a paucity, if not a total absence of any positive efforts by the patrol to recruit minority personnel and (3) utilization of unvalidated employment criteria and selection procedures and other discriminatory practices.

NAACP v. Allen, 493 F.2d 614, 620-1 (5th Cir. 1974).

Based on this record the Fifth Circuit upheld the district court's conclusion that numerical relief was essential toward making any "meaningful progress towards eliminating the unconstitutional practices and to overcome the patrol's thirty-seven year reputation as an all-white organization". Id.

Even after the Court of Appeals upheld the original hiring Order in this case, the district court found the Defendants, for the purpose of

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"frustrating or delaying full relief to the plaintiff class", to have "artificially restricted the size of the trooper force and the number of troopers hired". Order of August 5, 1975 J.A. 34[13].

Moreover the district court made the following findings with respect to the unusually high attrition rate for blacks hired since 1977:

> [T]he high attrition rate among blacks resulted from the selection of other than the best qualified blacks from the eligibility rosters, some social and official discrimination against blacks at the trooper training academy, preferential treatment of whites in some aspects of training and testing, and discipline of blacks harsher than that given whites for similar misconduct while on the force.

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[13] Citations to "J.A." are to the Joint Appendix.

Id.

Shortly before the imposition of the challenged order, the district court rejected the promotion proposal of the Patrol, finding that it failed to comply with the requirements of the 1981 consent decree that it be free of adverse impact. After applying the Uniform Guidelines of Selection Procedures, and noting that zero blacks would be promoted under the Patrol's plan, the court held:

> Short of outright exclusion based on race, it is hard to conceive of a selection procedure which would have a greater discriminatory impact.

Paradise v. Prescott, 580 F. Supp. 171, 173 (M.D. Ala. 1983).

This pattern of resistance on the part of the Department continued. Less than three years ago the district court

found:

> On February 10, 1984, less than two months from today, twelve years will have passed since this court condemned the racially discriminatory policies and practices of the Alabama Department of Public Safety. Nevertheless, the effects of these policies and practices remain pervasive and conspicuous at all ranks above the entry-level position. Of the 6 majors, there is still not one black. Of the 25 captains, there is still not one black. Of the 35 lieutenants, there is still not one black. Of the 65 sergeants, there is still not one black. And of the 66 corporals, only four are black. Thus, the department still operates an upper rank structure in which almost every trooper obtained his position through procedures that totally excluded black persons. Moreover, the department is still without acceptable procedures for advancement of black troopers into this structure, and it does not appear that any procedures will be in place within the near future. The preceding scenario is intolerable and must not continue. The time has now arrived for the department to

> take substantial steps to open the upper ranks to black troopers. (emphasis in original)

Paradise v. Prescott, 585 F.Supp. 72, 74 (M.D. Ala. 1983).

Another clear example of the court's concern with the Patrol's intention to carry out the decree in good faith was its response to the Department's contention that it "is without legal authority and sufficiently trained personnel to design any promotional procedures", pursuant to its Consent Decree obligation to provide for the advancement of black troopers into the upper ranks of the Patrol. Order of January 13, 1984 J.A. 138.

> The Public Safety Department's contention that it is without legal authority is not only meritless, it is frivolous.
>
> Moreover, that the Department of Public Safety would even advance

> this argument dramatically demonstrates the need for the relief imposed by this court. Such frivolous arguments serve no purpose other than to prolong the discriminatory effects of the department's 37-year history of racial discrimination.

Id. at 139.

Confronted with actions such as these the lower courts have frequently determined that positive action in the form of mandatory injunctive relief is necessary to overcome the effects of past discrimination and to prevent future discrimination. In a variety of circumstances where district courts have concluded that an employer would not obey a general injunction against employment discrimination, numerical hiring or promotion orders have been required simply to end continued intentional violations of

the law.[14] Race conscious orders regarding the selection of supervisory personnel[15] or public employees[16] have been utilized where district courts regarded them as necessary to prevent discrimination against subordinate workers or against the public. Where an employer has been found guilty of using a non-job related employment test, and no new test

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[14] See, e.g. NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974).

[15] See, e.g. McKenzie v. Sawyer, 684 F.2d 62 (D.C. Cir. 1982) (3 of 5 members of selection panel to be black); cf. Taylor v. Jones, 653 F.2d 1193 (8th Cir. 1981) (quota hiring necessary to end racist environment of virtually all white workforce).

[16] See, e.g., Williams v. Vukovich, 720 F.2d 909 (6th Cir. 1983) (police); NAACP v. Beecher, 679 F.2d 965 (1st Cir. 1982) (police and fire); Morgan v. Kerrigan, 530 F.2d 431 (1st Cir. 1976)(teachers).

has yet been framed, courts have directed that, as an interim measure, the old test may be utilized in combination with a race-conscious adjustment to eliminate the discriminatory effect of that test.[17] Even in providing relief for victims of past discrimination, judges have at times found it impracticable to frame decrees affecting thousands of potential victims of classwide discrimination with the same precision that might be possible in a single tort action.[18]

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[17] See, e.g., Berkman v. City of New York, 705 F.2d 584 (2d Cir. 1983) (interim numerical hiring order necessary as "compliance relief"); Kirkland v. New York Dept. of Corrections, 628 F.2d 796 (2d Cir. 1980) (Interim order adding 250 points to scores of minority applications on non-job related test).

[18] Segar v. Smith, 738 F.2d 1249, 1289 n. 36 (D.C. Cir. 1984) (individualized hearings not required where impracticable); Association Against

Several circuits have concluded that in some situations the unlawful deterrent effect of an employer's well deserved reputation for discrimination could only be dissipated by a court ordered increase in the number of minority or female employees.[19]

Similarly, when lower courts have concluded that eradication of continuing discrimination required an alteration of the group of individuals involved in making critical personnel decisions, they have issued orders directing that

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Discrimination v. City of Bridgeport, 20 FEP Cases 985 (D.Conn. 1979) (where number but not identities of victim known, beneficiaries of decree to be chosen by lot among probable victims).

19 Association Against Discrimination v. City of Bridgeport, 594 F.2d 306, 311 n.13 (2nd Cir. 1979); Carter v. Gallagher, 452 F.2d 315, (8th Cir. 1971).

specified numbers of minorities or females be included among officials responsible for recruiting new applicants,[20] considering appeals of rejected applicants,[21] training newly hired workers,[22] and, more broadly, evaluating all hiring and promotions.[23] Such orders were upheld as "an effective method to prevent future discrimination".[24]

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20 Commonwealth of Pennsylvania v. Rizzo, 13 FEP Cases 1475, 1483 (E.D. Pa. 1975).

21 Id.

22 Williams v. City of New Orleans, 543 F.Supp. 662, 682 (E.D. La. 1982), aff'd 729 F.2d 1554 (5th Cir. 1984) (en banc); United States v. Operating Engineers, 4 FEP Cases 1088, 1097 (N.D. Cal. 1972).

23 Ostapowicz v. Johnson Bronze Co., 12 FEP Cases 1230, 1232 (W.D. Pa. 1974).

24 Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 404 (3rd 1976).

Absent the requirement that the Department be forced to include blacks among the upper ranks of the Patrol -- as envisioned by the original hiring order and subsequent consent decree -- the likelihood of substantial change in the Department was virtually nil. In effect, the situation was not unlike that confronted by the court in Taylor v. Jones, 495 F.Supp. 1285 (E.D. Ark. 1980), aff'd, 653 F.2d 1193 (8th Cir. 1981), where a black plaintiff had been driven from her position as one of the Arkansas National Guard's few minority workers after a long period of harassment. The trial court held that full relief required more than an order reinstating Taylor in the job involving the same "appalling conditions." 495 F.Supp. at 1294. The

judge found that, at the offices of the Guard,

> as the environment approaches a fairer racial representation, the degree of racism tends to diminish. . . . [Plaintiff] has standing not only to seek reinstatement, but to seek reinstatement in a work place where all people are treated with decency and respect. The Court finds that this goal will be materially impeded unless the Arkansas National Guard is required to step up its employment of qualified black persons. . . . There simply is no other way to ensure that the law will be complied with in the future.

495 F.Supp. at 1294.[25]

The lower courts' choice of a one for one ratio was clearly based on its experience with the Department over a 12 year period: a period during which the defendant clearly demonstrated its

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25 See also, Sosna v. Iowa, 419 U.S. 393, 414 n.1 (1975) (White, J., dissenting).

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willingness to exhibit exceptional intransigence. The one for one promotion ratio ordered by the court addresses this intransigence as well as the government's broad interest in eradicating the lingering effects of discrimination and preventing the continuation of that discrimination into the future.

After almost half a century of existence and 12 years of litigation, with no real progress toward integrating the upper rank structure, the district court adopted a remedy that "promises realistically to work, and promises realistically to work now." (emphasis in original) Green v. County School Board, 391 U.S. 430, 439 (1968).

As this Court noted last term

> it is doubtful, given [the employer's] history in this

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> litigation, that the District Court had available to it any other effective remedy. That court, having had the parties before it over a period of time, was in the best position to judge whether an alternative remedy, would have been effective in ending petitioner's discriminatory practices.

Local 28, Sheet Metal Workers v. EEOC, 106 S.Ct. at 3056 (Opinion of Powell, J.).

The actions of the Patrol would have required a permanent one for one ratio in order to fully remedy, within this generation, the effects of the Patrol's adamant refusal to promote blacks. However, in the exercise of its equitable discretion, the district court's order, abandoning the one for one ratio as soon as a non-discriminatory promotion procedure was developed, proved a practical solution which reconciled both public and private needs. United States

v. Montgomery County Board of Education, 395 U.S. 225 (1969).

In framing remedial decrees, the federal courts act in a complex world in which it is at times impossible to reconstruct the past. If they are to be successful in meeting the demands for justice in the face of intransigent opposition, they must have the tools to implement remedies that are feasible and promising in their effectiveness.

CONCLUSION

For the above reasons the decision of the court of appeals should be affirmed.

Respectfully submitted,

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